99TH CONGRESS
2d Session

SENATE

EXEC. REPT.
99-17

SUPPLEMENTARY EXTRADITION TREATY WITH THE UNITED KINGDOM

JULY 8, 1986.—Ordered to be printed

Filed under authority of the order of the Senate of June 26, 1986

Mr. LUGAR, from the Committee on Foreign Relations, submitted the following

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REPORT

together with

ADDITIONAL VIEWS

[To accompany Tr. Doc. 99-8]

The Committee on Foreign Relations, to which was referred the Supplementary Extradition Treaty between the United States of America and the United Kingdom of Great Britain and Northern Ireland, with Annex, signed at Washington on June 25, 1985, having considered the same, reports favorably thereon with amendments and a declaration and recommends that the Senate give its advice and consent to ratification thereof.

PURPOSE

The purpose of the Supplementary Extradition Treaty is to revise and supplement the extradition treaty now in effect with the United Kingdom.

BACKGROUND

Article V of the current treaty that has been in force since 1977 provides that extradition shall not be granted if "the offense for which extradition is requested is regarded by the requested party as one of a political character." This clause excepting extradition for political offenses is similar to that found in all U.S. extradition treaties. However, as with these other treaties, nowhere in the U.K. treaty is it set out what crimes constitute political offenses.

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As a result, the courts have decided the issue on a case-by-case basis.

In three recent cases the Federal courts have denied requests by the United Kingdom for the extradition of members of the Provisional Irish Republican Army accused or convicted of committing acts of violence on the grounds that the offenses were political. Because of those cases, on June 25, 1985, the United States and the United Kingdom signed the Supplementary Extradition Treaty. It was submitted to the Senate for advice and consent to ratification on July 17, 1985. The supplementary treaty as submitted would, for all intents and purposes, have eliminated the political exception for acts of violence and with it the traditional role of U.S. courts to deny extradition in connection with alleged political offenses.

COMMITTEE ACTION

The committee, chaired by Senator Trible, held hearings on the treaty on August 1, September 18 and October 22, 1985. Administration representatives, Members of Congress, experts on extradition and others concerned with the treaty appeared. Twenty witnesses gave oral testimony; in addition, a large number of written analyses were received for the record. The witnesses who testified are as follows:

AUGUST 1, 1985

Abraham Sofaer, Legal Adviser, Department of State.

D. Lowell Jensen, Deputy Attorney General, Department of Justice.

SEPTEMBER 18, 1985

Representative Mario Biaggi (D-N.Y.).

Senator Dennis DeConcini (D-Ariz.).

Representative William J. Hughes (D.-N.J.).

Eugene J. McCarthy, former Senator.

Christopher H. Pyle, Professor of Politics, Mount Holyoke College.

M. Cherif Bassiouni, Professor of Law, DePauw University.

Charles Rice, Professor of Law, Notre Dame Law School.

OCTOBER 22, 1985

Representative Hamilton Fish, Jr. (R-N.Y.).

Representative Benjamin A. Gilman (R-N.Y.).

Raymond J. Flynn, Mayor, Boston, Mass.

Morton H. Halperin, American Civil Liberties Union.

Arthur C. Helton, Lawyers Committee for International Human Rights.

David Carliner, Chairman, International Human Rights Law Group.

Frank Durkan, O'Dwyer and Bernstein, Brehon Law Society of N.Y.

Judge Eugene E.J. Maier, Court of Common Pleas, First Judicial District, Philadelphia and President, Brehon Law Society of Philadelphia.

Keara M. O'Dempsey, St. Thomas School of Law, Miami, Fla.
Christopher H. Pyle, Professor of Politics, Mount Holyoke College.
Charles E. Rice, Professor of Law, Notre Dame Law School.
William M. Hannay, Schiff, Hardin and Waite.
Steven Lubet, Professor of Law, Northwestern School of Law.

The committee first considered the treaty at its April 16, 1986 business meeting. In an effort to promote compromise, Senator Pell offered an amendment to the treaty for himself and others. The amendment excluded certain acts from the political offense exception regardless of whether the victim was a soldier or a civilian. In certain other cases, it distinguished between attacks against soldiers and those against civilians on the grounds that the armed forces are likely to be primarily utilized in connection with a rebellion or politically motivated civil disturbance. It also addressed the question of the quantum of proof necessary to support an extradition request. A revised version of this amendment was discussed at the April 23, 1986 business meeting.

At its June 12 meeting the committee again considered the treaty. By unanimous consent, a draft resolution of ratification authored by Senators Lugar and Eagleton was made the pending business. This draft was an effort to balance anti-terrorism concerns and the right of due process for individuals.

Senator Helms offered an amendment to distinguish between attacks against soldiers and those against civilians. It differed from Senator Pell's earlier proposal by applying the civilian-military distinction to all offenses including those covered by international conventions to which the United States is a party. It failed by a vote of 2–15. Voting in the affirmative were Senators Helms and Zorinsky. Voting in the negative were Senators Lugar, Mathias, Kassebaum, Boschwitz, Pressler, Murkowski, Trible, Evans, Pell, Biden, Sarbanes, Cranston, Dodd, Eagleton and Kerry.

An amendment to the Lugar-Eagleton declaration was then offered by Senator Helms. The Helms amendment revised the declaration to read that the Senate would not consent to any treaty narrowing the political offense exception. It failed by a vote of 5–12. Voting in the affirmative were Senators Helms, Biden, Zorinsky, Dodd and Kerry. Voting in the negative were Senators Lugar, Mathias, Kassebaum, Boschwitz, Pressler, Murkowski, Trible, Evans, Pell, Sarbanes, Cranston and Eagleton.

Senator Helms next moved to delete Article 2 of the Supplementary Treaty. That article made the statute of limitations of the requesting state applicable in extradition proceedings. The effect of the Helms amendment was to maintain the provision in the existing treaty making the statute of either country applicable. The Helms amendment was approved 15–2. Voting in the affirmative were Senators Lugar, Helms, Mathias, Kassebaum, Boschwitz, Pressler, Murkowski, Trible, Pell, Biden, Sarbanes, Zorinsky, Cranston, Dodd and Kerry. Voting on the negative were Senators Evans and Eagleton.

A final amendment to delete what was then numbered Article 4 of the Supplementary Treaty was offered by Senator Helms. This article provides that the treaty is to apply to offenses committed before, as well as after, the treaty comes into effect. The amend-

ment failed by a vote of 7–10. Voting in the affirmative were Senators Helms, Biden, Sarbanes, Zorinsky, Cranston, Dodd and Kerry. Voting in the negative were Senators Lugar, Mathias, Kassebaum, Boschwitz, Pressler, Murkowski, Trible, Evans, Pell and Eagleton.

The committee then approved the Lugar-Eagleton resolution of ratification by a vote of 15–2. Voting in the affirmative were Senators Lugar, Mathias, Kassebaum, Boschwitz, Pressler, Murkowski, Trible, Evans, Pell, Biden, Sarbanes, Cranston, Dodd, Eagleton and Kerry. Voting in the negative were Senators Helms and Zorinsky. For ease of reference, the text of the Supplementary Treaty as amended by the committee appears in appendix 1.

Committee Comments and Recommendations

The essence of the committee's compromise is found in what are now Articles 1 and 3 of the Supplementary Treaty. Article 1 narrows the list of offenses which a court may treat as political offenses. However, references in the original Supplementary Treaty to property damage, possession, intent, and conspiracy were deleted; manslaughter was qualified by "voluntary", and unlawful detention was qualified by "serious".

Article 3, part (a) contains two distinct concepts. First, it authorizes a court to deny extradition based upon a persuasive factual showing that the requesting party has trumped-up charges against a dissident in order to obtain his extradition for trial or punishment. Second, it authorizes a court to deny extradition if the person sought for extradition can establish by a preponderance of the evidence that he would be prejudiced at his trial, or punished, detained or restricted in his personal liberty because of his race, religion, nationality or political opinions.

Article 3(a) adapts language found in Article 5 of the European Convention on the Suppression of Terrorism to which the United Kingdom is a party; the language from the Convention is modified by language from Section 3194 of the Extradition Act of 1984, H.R. 3347, sponsored by Representatives Hughes, Sawyer, Feighan, Smith and Sensenbrenner and approved by a voice vote of the House Judiciary Committee on October 4, 1983. The bill, although rejected by the House of Representatives when it failed to draw the necessary two-thirds majority under suspension of the House rules, was much praised in testimony before the Senate Foreign Relations Committee by witnesses who were basically opposed to the Supplementary Treaty as originally submitted.

Nothing in Article 3(a) should be interpreted as giving aid or comfort to those who commit terrorist acts of violence in the United Kingdom. Although the committee divided on the best way to help suppress these acts, it is united in its condemnation of terrorism. It would be a perversion of the committee's intent were article 3(a) used to impede the extradition of those sought for acts of terrorism.

During the June 12 business meeting the following colloquy with respect to article 3(a) took place:

> Senator Kerry. Mr. Chairman, as part of that report language I would ask you if it is your understanding and intention as principal sponsor of this amendment that an

individual, as part of showing that he would, and I quote the language of article 8 [now article 3], "if surrendered be prejudiced at his trial or punished, detained or restricted in his personal liberty by reason of his race, religion, nationality or political opinion," would that individual be able to challenge the fairness of the judicial system to which he would be returned and thereby raise a right of inquiry into the fairness of that system?

The CHAIRMAN. Yes.

Senator KERRY. And that is your intention in this particular amendment as well as in the treaty?

The CHAIRMAN. That is correct.

Senator BIDEN. Let me make sure as part of this colloquy that I understand the nature of the rule of inquiry into the justice system in Northern Ireland that we are establishing here.

My understanding is this: That notwithstanding that probable cause has been established in an American court; notwithstanding that the accused is the person sought; notwithstanding that it is an extraditable offense under the terms of this treaty we are about to vote on; and notwithstanding that otherwise it is an offense for which extradition would lie; and notwithstanding that it is an offense under this treaty for which the political offense doctrine would not otherwise apply; notwithstanding all of that, the defendant will have an opportunity in Federal court to introduce evidence that he or she would personally, because of their race, religion, nationality or political opinion, not be able to get a fair trial because of the court system or any other aspect of the judicial system in the requesting country, or that that person's extradition has been requested with a view to try or punish them on account of their race, their religion, nationality or political opinion.

The CHAIRMAN. My answer is yes.

Article 3(b) applies only to the United States. It does two things. First, it limits the scope of article 3(a) in U.S. extradition proceedings to offenses listed in Article 1 of the Supplementary Treaty. In other words, if an individual is wanted for extradition to the United Kingdom for fraud, drug smuggling or some other offense not listed in article 1, that individual may not invoke article 3(a) before a Federal magistrate or judge. Article 3(b) also gives either party to the extradition proceeding the right to appeal a finding under article 3(a).

The committee has made a second major change in the Supplementary Treaty as submitted. It has included, as article 2 of the amended treaty, a restatement of the procedures that have traditionally governed the consideration of an extradition request in U.S. courts. This article reaffirms that the magistrate or Federal judge is to permit the individual to present evidence in connection with the request. It insures that no individual is to be extradited without a fair hearing. It is designed to lay to rest any assumption that extradition under this Supplementary Treaty will be "auto-

matic" or that Federal magistrates and judges will not carefully evaluate the evidence presented in support of extradition.

The committee also reviewed the issue of retroactivity. What is now Article 5 of the Supplementary Treaty provides that the treaty will apply to offenses committed before the treaty becomes effective. This makes it retroactive. For example, if some of those who participated in the attempt to murder Mrs. Thatcher and her Cabinet at Brighton in 1984 were found in the United States in 1987, article 5 would insure that they could not escape extradition by taking advantage of the case law as it now stands.

While some concern was expressed about possible unfairness, it was noted that this treaty does not criminalize any conduct that had not been criminal before. Murder has always been murder. U.S. courts have found no constitutional problem with retroactivity. Indeed, they have held that absent an express provision to the contrary, extradition treaties will be construed to be retroactive. Furthermore, the Senate has approved a retroactive clause identical to that in article 5 in treaties with France in 1970 and Sweden in 1983. Twenty-three other supplementary treaties in modern times have been approved with some type of retroactive clause.

The committee also made another change in the Supplementary Treaty as submitted. Article 2 of the treaty, as submitted, would have made the statute of limitations of the requesting state applicable. This article was deleted.

Finally, the committee recommended that the Senate approve the resolution of ratification with a declaration. This declaration states that the Senate will not approve treaties that would narrow the political offense exception with totalitarian or non-democratic regimes. It also makes clear that neither the Supplementary Treaty nor any particular provision of it is to be considered a precedent for other treaties.

The Supplementary Treaty has been one of the most divisive and contentious issues the committee has faced this Congress. The committee has worked long and hard to develop a compromise that could win broad, bipartisan support. It believes that the package it has approved meets this need. It recommends prompt Senate approval.

Section-by-Section Analysis

ARTICLE 1

As revised by the committee's amendment, article 1 has five subparts. Subpart (a) excludes from the consideration as a political offense offenses listed in certain multilateral conventions. These are the conventions where the two governments have agreed either to extradite or try an individual sought for such an offense. The four conventions to which this at present would apply are:

The Convention for the Suppression of Unlawful Seizure of Aircraft, opened for signature at The Hague on 16 December 1970;

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The Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, opened for signature at Montreal on 23 September 1971;

The Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, opened for signature at New York on 14 December 1973; and

The International Convention against the Taking of Hostages, opened for signature at New York on 18 December 1979.

Subpart (b) covers serious violents crimes against the person. The term "voluntary manslaughter" is intended to cover crimes which have been held by the U.K. courts to be manslaughter and which in many U.S. states would amount to second degree murder.

Manslaughter under the law of many states of the United States is an offense punishable by up to 10 years imprisonment and under the law of the United Kingdom is punishable by up to life imprisonment. In most states of the United States it applies primarily to such involuntary offenses as the grossly negligent and reckless driving of an automobile where a life is lost or such voluntary offenses as killing in the heat of passion.

The remaining subparts are, for the most part, self-explanatory. Subpart (c) excludes any offense involving kidnapping, abduction, or serious unlawful detention, including taking a hostage. Subpart (d) excludes any offense involving the use of a bomb, grenade, rocket, firearm, letter bomb, parcel bomb or any type of incendiary device from the political offense exception if that use endangers even a single person. Subpart (e) carries the exclusion forward to attempts and to those who are accomplices. For example, an individual accused of helping to construct a bomb, the use of which endangered a person, would not be able to assert the political offense exception.

ARTICLE 2

Article 2 is a distillation of settled U.S. law. Article 2 makes clear that the person sought for extradition can introduce evidence on the question of probable cause.

It is fundamental that in an extradition hearing the issue before the court is probable cause, not the ultimate guilt of innocence of the person. The purpose of an extradition hearing is to determine whether there are sufficient grounds to bind the individual over for trial, or to return him or her to complete an outstanding sentence in the requesting country. In the former situation, it is the function of the requesting state to resolve at trial the ultimate question of guilt or innocence. Obviously, at the time of trial the person may offer evidence which contradicts that submitted by the requesting country, or may raise any appropriate affirmative defense to conviction on the charges, e.g., self-defense, insanity, intoxication, provocation, mistake of fact, etc.

ARTICLE 3

Article 3(a) provides that, notwithstanding article 1, "extradition shall not occur if the person sought establishes to the satisfaction of the competent judicial authority by a preponderance of the evidence that the request for extradition has in fact been made with a view to try or punish him on account of his race, religion, national-

ity, or political opinions or that he would, if surrendered, be prejudiced at his trial or punished, detained, or restricted in his personal liberty by reason of his race, religion, nationality, or political opinions." (See the committee's description of its consideration of this article above.)

A number of committee members expressed unease at permitting U.S. courts to entertain an inquiry as sensitive as that contemplated by article 3(a). This is particularly the case given the nature of discovery under U.S. law which has no counterpart in British or European practice. The committee wishes to caution that sensitive foreign policy issues may be involved even at the discovery stage and that use of protective orders may be appropriate.

Article 3(b) applies only to the United States. It does two things. First, it limits the scope of article 3(a) in U.S. extradition proceedings to offenses listed in Article 1 of the Supplementary Treaty. In other words, if an individual is wanted for extradition to the United Kingdom for fraud, drug smuggling or some other offense not listed in article 1, that individual may not invoke article 3(a) before a Federal magistrate or judge.

Article 3(b) also gives either party to the extradition proceeding the right to appeal a finding under article 3(a). Because an initial finding may either be made by a Federal magistrate or Federal district court judge, article 3(b) makes either the Federal Rules of Civil Procedure or Federal Rules of Appellate Procedure, "as appropriate," controlling on appeal. If the appeal is from a Federal magistrate's decision, it is to be lodged in Federal district court and the Federal Rules of Civil Procedure shall apply. If it is from a Federal district court, the appeal, of course, is to be lodged with the appropriate U.S. court of appeals and the Federal Rules and Appellate Procedures are to control. This article is not intended to make the Federal rules generally applicable to the extradition hearing itself, but only to the appeal of a decision under article 3(a).

In either case, a notice of appeal must be filed within 30 days from the date the decision containing the initial finding is filed. The appeal is to be expedited at every stage. Nothing in article 3(b) is to be interpreted as permitting interlocutory appeals or otherwise upsetting established rules of appellate procedure.

ARTICLE 4

Article 4 of the Supplementary Treaty amends Article VIII, paragraph (2) of the current Extradition Treaty by providing that the requesting state shall have as many as 60 days following provisional arrest to submit evidence in support of an extradition request, and that if by that time such evidence has not been submitted the person arrested shall be set at liberty. The current treaty allows only 45 days.

ARTICLE 5

With one exception, Article 5 of the Supplementary Treaty applies to offenses committed before, as well as after, the treaty enters into force. The exception is for acts which were not a crime under the laws of both the United States and the United Kingdom at the time they were committed.

ARTICLE 6

This article makes the Supplementary Treaty part and parcel of the existing extradition treaty. The two are to be considered together in evaluating an extradition request. Article 6 also specifies the respective territories of the two countries to which the treaty is to apply.

ARTICLE 7

Article 7 makes the Supplementary Treaty subject to ratification. It provides that it shall enter into force upon the exchange of instruments of ratification. It is terminable in the same manner as the present extradition treaty.

TEXT OF THE RESOLUTION OF RATIFICATION

Resolved, (two-thirds of the Senators present concurring therein), That the Senate advise and consent to the ratification of the Supplementary Extradition Treaty between the United States of America and the United Kingdom of Great Britain and Northern Ireland, with Annex, signed at Washington, June 25, 1985, subject to the following amendments:

(1) Amend article 1 to read as follows:

"For the purposes of the Extradition Treaty, none of the following shall be regarded as a offense of a political character:

(a) an offense for which both Contracting Parties have the obligation pursuant to a multilateral international agreement to extradite the person sought or to submit his case to their competent authorities for decision as to prosecution;

(b) murder, voluntary manslaughter, and assault causing grievous bodily harm;

(c) kidnapping, abduction, or serious unlawful detention, including taking a hostage;

(d) an offense involving the use of a bomb, grenade, rocket, firearm, letter or parcel bomb, or any incendiary device if this use endangers any person; and

(e) an attempt to commit any of the foregoing offenses or participation as an accomplice of a person who commits or attempts to commit such an offense."

(2) Amend article 2 to read as follows:

"Nothing in this Supplementary Treaty shall be interpreted as imposing the obligation to extradite if the judicial authority of the requested party determines that the evidence of criminality presented is not sufficient to sustain the charge under the provisions of the treaty. The evidence of criminality must be such as, according to the law of the requested party, would justify committal for trial if the offense had been committed in the territory of the requested party.

"In determining whether an individual is extraditable from the United States, the judicial authority of the

United States shall permit the individual sought to present evidence on the questions of whether:

(1) there is probable cause;

(2) a defense to extradition specified in the Extradition Treaty or this Supplementary Treaty, and within the jurisdiction of the courts, exists; and

(3) the act upon which the request for extradition is based would constitute an offense punishable under the laws of the United States.

"Probable cause means whether there is sufficient evidence to warrant a man of reasonable caution in the belief that:

(1) the person arrested or summoned to appear is the person sought;

(2) in the case of a person accused of having committed a crime, an offense has been committed by the accused; and

(3) in the case of a person alleged to have been convicted of an offense, a certificate of conviction or other evidence of conviction or criminality exists."

(3) Insert after article 2 the following new article:

"ARTICLE 3

"(a) Notwithstanding any other provision of this Supplementary Treaty, extradition shall not occur if the person sought establishes to the satisfaction of the competent judicial authority by a preponderance of the evidence that the request for extradition has in fact been made with a view to try or punish him on account of his race, religion, nationality, or political opinions, or that he would, if surrendered, be prejudiced at his trial or punished, detained or restricted in his personal liberty by reason of his race, religion, nationality, or political opinions.

"(b) In the United States, the competent judicial authority shall only consider the defense to extradition set forth in paragraph (a) for offenses listed in Article 1 of this Supplementary Treaty. A finding under paragraph (a) shall be immediately appealable by either party to the United States district court, or court of appeals, as appropriate. The appeal shall receive expedited consideration at every stage. The time for filing a notice of appeal shall be 30 days from the date of the filing of the decision. In all other respects, the applicable provisions of the Federal Rules of Appellate Procedure or Civil Procedure, as appropriate, shall govern the appeals process."

(4) Renumber the remaining articles 4, 5, 6, 7.

DECLARATION

The Senate of the United States declares that it will not give its advice and consent to any treaty that would narrow the political offense exception with a totalitarian or other non-democratic regime and that nothing in the Supplementary Treaty with the United Kingdom shall be considered a precedent by the executive branch or the Senate for other treaties.

ADDITIONAL VIEWS OF SENATOR JESSE HELMS

1. The Abrogation of the Political Offense Doctrine

The ratification of the Supplementary Extradition Treaty between the United Kingdom and the United States would create a precedent profoundly altering the U.S. treatment of fugitives who escape from tyranny while fighting for freedom.

This treaty makes no legal distinction between terrorists who kill and maim innocent men, women, and children on the one hand, and freedom fighters who are engaged in military or paramilitary actions in just wars for the reestablishment of traditional moral, cultural and religious values.

For the first time in history, a person fighting against extradition would not be able to present the political offense defense in a U.S. court. For over 200 years, our tradition has been that a court may rule against extradition based on the consideration that the accused was engaged in military operations in an effort to win freedom for his or her country. Indeed, this tradition has become a basic legal principle.

Moreover, the treaty would seriously impair the battle against terrorism by lumping criminal terrorists in with genuine freedom fighters. Although it is easy to stir emotions with accounts of IRA terrorists who attack the civilian population at large, the ratification of the treaty as it stands would abolish the distinction between terrorists and genuine freedom fighters.

Once the legal distinction has been abolished between terrorists and freedom fighters, it will be very difficult to sustain support for the Afghan mujahideen, Savimbi's UNITA fighters, the Nicaraguan resistance, the Cambodian resistance, or any other group fighting against an established tyranny.

It is not enough to say that treaties abolishing the political offense defense will only be concluded with established democracies. It is not enough to say that there is no right of rebellion against a country with democratic institutions. It is not enough to say that the United Kingdom itself is a democracy.

These things are not in themselves sufficient reason to abrogate an objective legal principle and substitute a subjective and changing judgment based upon political expediency. There is no commonly accepted definition of a "democracy." The word itself is claimed both by free countries and abysmal dictatorships. The history even of Western democracies sadly demonstrates that freedom is not forever, and that democracies, like republics and other forms of free government, can fall prey to totalitarian forces.

Moreover, a nation that is free in the main part of its territories, may not be free in all of the territories that it governs. From the time of the Barons at Runnymede, the history of Great Britain is a history of different groups and classes struggling to be free. The

United States itself is a product of that history. It is very difficult for an outsider to be certain that the process has been completed.

2. The Supplementary Extradition Treaty and the American Revolution

The impact of abolishing the political offense doctrine may best be seen in our own history. Article 1 of the Supplementary Treaty, as reported, includes the following:

> "For the purposes of the Extradition Treaty, none of the following shall be regarded as an offense of a political character:
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> • • • • • • •
>
> (b) murder, voluntary manslaughter, and assault causing grievous bodily harm;
>
> • • • • • • •
>
> (d) an offense involving the use of a bomb, grenade, rocket, firearm . . . or any incendiary device if this use endangers any person."

If this treaty had been in effect in 1776, or even after the Treaty of Paris in 1783, this language would have labeled the boys who fought at Lexington and Concord as terrorists. There is no question that the British authorities in 1776 would have considered the guerilla operations of the Americans to be murder and assault. Their offenses included the use of bombs, grenades, rockets, firearms, and incendiary devices endangering persons, as may be demonstrated by references to our National Anthem. Yes, there is no doubt whatsoever that such a treaty would have required us to extradite the patriots who fired the shot heard 'round the world to swing on a British gallows.

For this reason, the infant United States was properly wary of extradition treaties. It was many, many decades before the first one was signed. And remembering our revolutionary origin, American courts developed the doctrine of the political offense exception: No extradition if the accused was sought for violent actions relating to a battle for his country's freedom.

3. The Distinction Between Patriots and Terrorists

The distinction between patriots and terrorists is not difficult to understand. Both President Reagan and Secretary of State Shultz have succinctly made this distinction in recent statements. The Supplementary Treaty flies in the face of both these statements.

At the Tokyo Summit, President Reagan said:

> The cliche line is going around that, well, one man's terrorist is another man's freedom fighter. No such thing.
>
> The people that are customarily called freedom fighters are fighting against organized military forces in what—even if it is a civil war, it is a war. Terrorists, as I said before, are people who deliberately choose as a target to murder and maim innocent people who have no influence upon the things that they think of as their political goals.

(May 7, 1986)

In an interview a few months ago, Secretary of State Shultz made exactly the same distinction:

> Q. Is there an accepted definition of terrorism—and how would you distinguish between the terrorist and the insurgent?
>
> A. There is no legal or universally accepted definition of terrorism. We describe it as the use of threat or violence for political purposes to create a state of fear which will cause individuals, groups or governments to alter their behavior or policies. Its targets are civilians, non-combatants, bystanders or symbolic persons or places.
>
> An insurgent is in revolt against an established government. His objective is political power. His methods are military or paramilitary. He actively seeks support, usually within one country.

(AWR, August 1985)

Finally, it should be noted that U.S. Attorney General Edwin Meese also adopted this same distinction in a major address on terrorism which he delivered at the Jonathan Institute in Tel Aviv:

> I think Benjamin Netanyahu summed it up very well when he said: "Terrorism is the deliberate and systematic murder, maiming and menacing of the innocent to inspire fear for political ends." Now I suggest that that definition is vitally important, because it describes the nature of the battle we are talking about. And it also describes the character of the participants. It provides a clear distinction which separates terrorism from ordinary warfare, or legitimate military activity, because it demonstrates that the targets of terrorism are innocent civilians, rather than combatant forces.

(May 15, 1985)

Any reasonable treaty on extradition, even with a democracy, must preserve this distinction. A terrorist aims his attack at the people. His aim is to disorient, disrupt, and destabilize. His hope is to break down all organized forces through fear and paralysis. Thus he strikes at innocent civilians, especially women and children. He makes bombings in crowded places unpredictable. He attacks symbolic persons such as Prime Minister Thatcher and Lord Mountbatten or soliders off duty relaxing in nightclubs. He frequently attacks these targets in other countries to draw attention to his political cause, or to raise money through blackmail. No patriot resorts to such criminal tactics, even in defense of freedom.

A patriot, on the other hand, attacks the military or defense forces of the occupying power. As Secretary Shultz says, his methods are military or paramilitary, in the tradition of the American Revolution. He does not engage in attack which harm civilians or which might be expected to harm civilians. He does not attack sol-

diers when they are sleeping peacefully in their homes, or relaxing in nightclubs. He may attack soldiers on duty or in the barracks, but it is the duty of soldiers and their commanding officers to be prepared against such attacks. Moreover, as Secretary Shultz points out, such attacks are only considered to be part of an insurgency when they are conducted within the country which the troops are occupying.

4. The Political Offense Doctrine as a Defense

It is important to understand that the political offense doctrine has always been construed narrowly by the courts. No one can escape extradition for crimes just because that person asserts that the crimes were committed in pursuit of political goals. It is a defense that the accused can raise in the courts against extradition; it is not an automatic right. The court must weigh the evidence adduced in support of the fact that the actions of the accused were part of a true insurgency. Courts can, and have, rejected the political offense doctrine as a defense when the courts determined that the accused was, in fact, a terrorist, or a common criminal, and not a rebel.

The political offense doctrine was established nearly 200 years ago to provide a haven under international law for unsuccessful rebels who fought for their freedom against established authority in their country and lost.

This doctrine has been carried forward in all the Western democracies until the present day.

Terrorism is a term which has no legal definition. However, in common use, it is applied to wanton crimes of violence, even when politically motivated, against innocent civilians. International law has created exceptions to the political offense exception for certain specific crimes, namely,

attacks upon airplanes in international travel;

seizure of hostages in international transport;

the use of bombs and booby traps directed against civilian targets; and

attacks upon diplomats, embassies, and heads of state.

In U.S. law, the political offense exception has received a narrow definition in circuit courts of appeals. The definition is as follows: a violent act or acts committed in furtherance of an armed uprising, insurrection, or rebellion by a national of the country in which the disturbance was taking place. Clearly it excludes acts against civilians, and acts of wanton and reckless violence (such as described in the previous paragraph), even when a political motivation is asserted by the offenders. Just as clearly, it excludes attacks across national borders, and conspiracies relating to those attacks.

It is natural that an incumbent administration in a situation of insurrection and rebellion will attempt to obtain custody of leaders of the rebellion by any and all means. One of the traditional methods is the extradition of such individuals by accusing them of having perpetrated common crimes. Those alleged criminal acts are in fact the acts of rebellion or insurrection which the political offense exception seeks to protect.

It is very tempting to abrogate the political offense exception in order to help a long-time ally that is faced with violent insurrection. But we should not give up the principles which have been ingrained in our legal system since the founding of our constitutional republic.

APPENDIX 1

Text of treaty incorporating amendments recommended by Senate Foreign Relations Committee:

SUPPLEMENTARY TREATY CONCERNING THE EXTRADITION TREATY BETWEEN THE GOVERNMENT OF THE UNITED STATES OF AMERICA AND THE GOVERNMENT OF THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND, SIGNED AT LONDON ON 8 JUNE 1972

The Government of the United States of America and the Government of the United Kingdom of Great Britain and Northern Ireland;

Desiring to make more effective the Extradition Treaty between the Contracting Parties, signed at London on 8 June 1972 (hereinafter referred to as "the Extradition Treaty");

Have resolved to conclude a Supplementary Treaty and have agreed as follows:

ARTICLE 1

For the purposes of the Extradition Treaty, none of the following shall be regarded as an offense of a political character:

(a) an offense for which both Contracting Parties have the obligation pursuant to a multilateral international agreement to extradite the person sought or to submit his case to their competent authorities for decision as to prosecution;

(b) murder, voluntary manslaughter, and assault causing grievous bodily harm;

(c) kidnapping, abduction, or serious unlawful detention, including taking a hostage;

(d) an offense involving the use of a bomb, grenade, rocket, firearm, letter or parcel bomb, or any incendiary device if this use endangers any person;

(e) an attempt to commit any of the foregoing offenses or participation as an accomplice of a person who commits or attempts to commit such an offense.

ARTICLE 2

Nothing in this Supplementary Treaty shall be interpreted as imposing the obligation to extradite if the judicial authority of the requested Party determines that the evidence of criminality presented is not sufficient to sustain the charge under the provisions of the treaty. The evidence of criminality must be such as, according to the law of the requested Party, would justify committal for trial if the offense had been committed in the territory of the requested Party.

In determining whether an individual is extraditable from the United States, the judicial authority of the United States shall permit the individual sought to present evidence on the questions of whether:

(1) there is probable cause;

(2) a defense to extradition specified in the Extradition Treaty or this Supplementary Treaty, and within the jurisdiction of the courts, exists; and

(3) the act upon which the request for extradition is based would constitute an offense punishable under the laws of the United States.

Probable cause means whether there is sufficient evidence to warrant a man of reasonable caution in the belief that:

(1) the person arrested or summoned to appear is the person sought;

(2) in the case of a person accused of having committed a crime, an offense has been committed by the accused; and

(3) in the case of a person alleged to have been convicted of an offense, a certificate of conviction or other evidence of conviction or criminality exists.

ARTICLE 3

(a) Nothwithstanding any other provision of this Supplementary Treaty, extradition shall not occur if the person sought establishes to the satisfaction of the competent judicial authority by a preponderance of the evidence that the request for extraditon has in fact been made with a view to try or punish him on account of his race, religion, nationality, or political opinions, or that he would, if surrendered, be prejudiced at his trail or punished, detained or restricted in his personal liberty by reason of his race, religion, nationality, or political opinions.

(b) In the United States, the competent judicial authority shall only consider the defense to extradition set forth in paragraph (a) for defenses listed in Article 1 of this Supplementary Treaty. A finding under paragraph (a) shall be immediately appealable by either party to the United States district court, or court of appeals, as appropriate. The appeal shall receive expedited consideration at every stage. The time for filing a notice of appeal shall be 30 days from the date of the filing of the decision. In all other respects, the applicable provisions of the Federal Rules of Appellate Procedure or Civil Procedure, as appropriate, shall govern the appeals process.

ARTICLE 4

Article VIII, paragraph (2) of the Extradition Treaty is amended to read as follows:

(2) A person arrested upon such an application shall be set at liberty upon the expiration of sixty days from the date of his arrest if a request for his extradition shall not have been received. This provision shall not prevent the institution of further proceedings for the extradition of this person sought if a request for extradition is subsequently received.

ARTICLE 5

This Supplementary Treaty shall apply to any offense committed before or after this Supplementary Treaty enters into force, provided that this Supplementary Treaty shall not apply to an offense committed before this Supplementary Treaty enters into force which was not an offense under the laws of both Contracting Parties at the time of its commission.

ARTICLE 6

This Supplementary Treaty shall form an integral part of the Extradition Treaty and shall apply:

(a) in relation to the United Kingdom: to Great Britain and Northern Ireland, the Channel Islands, the Isle of Man and the territories for whose international relations the United Kingdom is responsible which are listed in the Annex to this Supplementary Treaty;

(b) to the United States of America;

and references to the territory of a Contracting Party shall be construed accordingly.

ARTICLE 7

This Supplementary Treaty shall be subject to ratification and the instruments of ratification shall be exchanged at London as soon as possible. It shall enter into force upon the exchange of instruments of ratification. It shall be subject to termination in the same manner as the Extradition Treaty.

ANNEX

Anguilla; Bermuda; British Indian Ocean Territory; British Virgin Islands; Cayman Islands; Falkland Islands; Falkland Island Dependencies; Gibraltar; Hong Kong; Montserrat; Pitcairn, Henderson, Ducie and Oeno Islands; St. Helena; St. Helena Dependencies; The Sovereign Base Areas of Akrotiri and Dhekelia in the Island of Cyprus; and Turks and Caicos Islands.

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